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**SPECIAL PROGRAM
EXAMINATION UNIT**

In re Application of :
R. F. Schmitt et al :
Application No. 08/234,225 :
Filed: April 28, 1994 :
Attorney Docket No. 22970 :
DECISION DISMISSING PETITION

This is a decision on the petition filed November 8, 1994, requesting that the above-identified application be accorded a filing date of April 27, 1994, rather than the presently accorded filing date of April 28, 1994.

On November 8, 1994, inter alia, the present petition and the requisite petition fee were filed. In support of the petition, a copy of the filing receipt and the transmittal letter submitted on filing were submitted. Petitioners request that the application be accorded a filing date of April 27, 1994.

On March 8, 1995, a copy of the present petition was filed.

A review of the record reveals that the application papers had a proper certificate of mailing by Express Mail and the Express Mail label number was placed on the papers. However, Federal and District of Columbia government offices, including the Patent and Trademark Office (PTO), were officially closed for the entire day on April 27, 1994. The day was proclaimed by President Clinton as a National Day of Mourning for the death of former President Nixon. Under such conditions, the PTO considers that day as a "federal holiday within the District of Columbia" under 35 U.S.C. 21. See 1162 OG 104 and notice entitled "Filing Of Papers During Unscheduled Closings Of The Patent and Trademark Office", originally published at 1097 OG 53, reprinted at 1158 OG 8, [copies enclosed].

In accordance with PTO procedure, the present application was accorded a filing date of Thursday, April 28, 1994, the next business day following the date of deposit in Express Mail service. The fact that no papers are received or stamped on Saturdays, Sundays or Federal holidays within the District of Columbia and the handling of Express Mail in such cases is clearly set out in 37 CFR 1.6(a) and 1.10(a).

As set forth in 35 U.S.C. 21(a), the Commissioner may (not shall) prescribe that any paper required to be filed in the PTO will be considered filed in the Office on the date on which it was deposited with the U.S. Postal Service. The Commissioner has adopted a procedure for according an application a filing date as of the date the application is shown to have been deposited in Express Mail service with the U.S. Postal Service. The procedure adopted excludes Saturdays, Sundays and Federal holidays as possible filing dates. See 37 CFR 1.6(a) and 1.10(a). The privilege of using Express Mail procedure for filing applications was not intended to afford applicants the opportunity to obtain a filing date that they would not be entitled to if they had deposited the papers in the PTO itself on the same day. Since the PTO does not accept papers filed on Saturdays, Sundays or Federal holidays, it was never intended to consider papers deposited in Express Mail as having been filed on Saturdays, Sundays or Federal holidays.

The PTO was officially closed on April 27, 1994. The day was proclaimed by President Clinton as a National Day of Mourning. Therefore, no papers could be deposited or accepted in the Office on that day. Any action or fee due on that day is considered timely if the action was taken, or the fee paid, on the next succeeding business day on which the PTO was opened, i.e., April 28, 1994.

Of course, "in an extraordinary situation, where justice requires" the Commissioner may waive or suspend the rules and accord this application a April 27, 1994 filing date pursuant to 37 CFR 1.183. In this case, petitioners have not demonstrated that any patent rights will be lost unless the earlier filing date is accorded the application. Under the circumstances, petitioners have failed to show the present situation as extraordinary where justice requires waiver of the requirements of the rule.

The petition is dismissed. Under 37 CFR 1.6(a), the application is entitled to a filing date of April 28, 1994.

The application is being returned to Examining Group 3500 with a filing date of April 28, 1994, for further processing as an allowed application.

Fred A. Silverberg

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Enclosures: 1162 OG 104
1158 OG 8